

**IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI****FREDDIE WEBBER, JR.****APPELLANT****VS.****NO. 2013-M-0937****STATE OF MISSISSIPPI****APPELLEE****RESPONSE IN OPPOSITION TO APPLICATION FOR LEAVE TO PROCEED IN THE  
TRIAL COURT**

Freddie Webber, Jr. was convicted in the Circuit Court of Lowndes County, Honorable Lee J. Howard, Circuit Judge, presiding, of sale of cocaine. He was thereafter sentenced as a habitual offender to serve a term of thirty years in the custody of the Mississippi Department of Corrections. Feeling aggrieved of the judgment thus entered against him, Webber appealed. His conviction and sentence were affirmed by this Court on March 7, 2013. *Webber v. State*, 108 So.3d 930 (Miss. 2013).

Webber has now filed in this Court an application for leave to file a motion for post-conviction relief in the trial court. Pursuant to this Court's order dated August 7, 2013, the State submits this response in opposition to Webber's application.

**FACTS**

The facts of this case were ably stated in this Court's opinion affirming Webber's conviction and sentence as follows:

On April 28, 2009, Lloyd McWilliams, a Lowndes County narcotics agent,

enlisted James Jones, a confidential informant, to purchase drugs from individuals in Columbus, Mississippi. Jones completed two transactions that day, which were captured on video. One of those transactions was a buy from Webber.

Jones testified for the State and explained his pay arrangement with the county. He told the jury that he purchased twenty dollars' worth of cocaine from Webber, which he then placed in a bag and delivered to Agent McWilliams. At trial, Jones identified both the bag and Webber. During Jones's testimony, the State submitted a DVD that contained audio and video footage of the transaction, which the jury then viewed. During its case-in-chief, the State also called Agent McWilliams and Bill Smith, Director of Forensic Chemistry at the Columbus Forensic Lab. Smith testified that the substance in question was, in fact, cocaine. Agent McWilliams confirmed that Jones was paid for the Webber transaction and explained that the video of the transaction was used to identify Webber.

The defense presented no evidence and called no witnesses. The jury subsequently found Webber guilty as charged.

*Webber v. State*, 108 So.3d 930, 931 (¶¶2-4) (Miss. 2013).

## **ARGUMENT**

Webber claims that he is entitled to relief because his indictment omitted what he deems are essential elements of the crime of sale of cocaine. He also alleges error regarding the amendment of the indictment to reflect habitual offender status. Both of Webber's claims are procedurally barred because they were capable of determination at trial and on direct appeal. Miss. Code Ann. § 99-39-21. In addition to being procedurally barred, the State would also show that Webber's claims are without merit.

Webber claims that his indictment was defective because it failed to state which schedule cocaine falls under and because it failed to state how much money he received from selling the cocaine. Webber is under the false impression that these are essential elements of the crime of sale of cocaine. First, there is no requirement that an indictment for sale of cocaine must state that cocaine is a Schedule II drug. See *Coleman v. State*, 388 So.2d 157, 160 (Miss. 1980) (“[A]n indictment charging the sale of cocaine is sufficient to charge the sale of a Schedule II controlled

substance.”). See also, *Lawrence v. State*, 928 So.2d 894, 898-899 (¶¶15-16) (Miss. Ct. App. 2005) (holding that proof that a particular controlled substance belongs to a particular schedule is not an essential element of the crime of sale of a controlled substance).

Additionally, the amount of money the defendant receives for the sale of a controlled substance is simply not an essential element of the crime of sale of a controlled substance. *Shorter v. State*, 946 So.2d 815, 818 (¶11) (Miss. Ct. App. 2007).

Webber claims two deficiencies pertaining to the amendment to his indictment to include habitual offender status. The first argument relates to timing of the amendment, while the second argument advances a claim that habitual offender sentencing is a double jeopardy violation.

The record reflects that Webber’s trial commenced on August 23, 2011. The State moved to amend the indictment on August 22, 2011. Exhibit B-1 to Webber’s motion. The copy of the first page of the trial court’s order allowing the amendment appears to be date stamped August 24, 2011, with a “5” handwritten over the “4” in “24.” Webber’s Exhibit B-2. However, the record shows that the State brought the motion to a hearing prior to resting its case, and that the trial court orally accepted the amendment at that time on August 24, 2011. T. 192-198. Further, the record reflects that Webber’s sentencing hearing was held on September 2, 2011. T. 252.

In *Gowdy v. State*, this Court held, “An amendment to the indictment to allege habitual offender status **after conviction** is an unfair surprise.” 56 So. 3d 540 (Miss. 2011). This Court has also held that *Gowdy* applies retroactively. *McCain v. State*, 81 So. 3d 1055, 1059 (¶8) (Miss. 2012). However, there is no *Gowdy* problem in the present case because the State filed a motion to amend the indictment prior to trial, and the court granted the motion before conviction. Further, there is no indication in the record that there had been any plea negotiations between the State and Webber prior to the amendment, nor any claim by Webber that if such plea negotiations had occurred

that he would have been in a better position to make an informed decision as to whether to plea if he had known the State would later seek habitual offender status. As such, *Gowdy* does not apply to the facts of the present case.

Finally, Webber claims that being sentenced as a habitual offender violates his right to be free from double jeopardy because he is being twice punished for those prior offenses. Although the State is unable to find a case in which this Court has addressed this precise issue, the Court of Appeals, relying on a Fifth Circuit case, has rejected the claim. In *Denman v. State*, the Court of Appeals held that the habitual offender statute “‘fixes the punishment for future felony offenses,’ and that it ‘does not punish or increase the punishment for those past offenses.’” 964 So.2d 620, 624-625 (¶16) (Miss. Ct. App. 2007) (quoting *Perkins v. Cabana*, 794 F.2d 168, 179 (5th Cir. 1986)). Accordingly, Webber’s claim that habitual offender sentencing violates the Double Jeopardy Clause is without merit.

### CONCLUSION

For the foregoing reasons, the State respectfully submits that Webber is not entitled to a hearing, and his application should be denied.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL

BY: /s/ La Donna C. Holland  
LA DONNA C. HOLLAND  
SPECIAL ASSISTANT ATTORNEY GENERAL  
MISSISSIPPI BAR NO. 101888

OFFICE OF THE ATTORNEY GENERAL  
POST OFFICE BOX 220  
JACKSON, MS 39205-0220

## CERTIFICATE OF SERVICE

I hereby certify that on this day I electronically filed the foregoing pleading or other paper with the Clerk of the Court using the MEC system which sent notification of such filing to the following:

Further, I hereby certify that I have mailed by United States Postal Service the document to the following non-MEC participants:

Freddie Webber, Jr. # 167596  
SMCI  
Post Office Box 1419  
Leakesville, MS 39451-1419

This the 14th day of August, 2013.

/s/ La Donna C. Holland  
LA DONNA C. HOLLAND  
SPECIAL ASSISTANT ATTORNEY GENERAL

OFFICE OF THE ATTORNEY GENERAL  
POST OFFICE BOX 220  
JACKSON, MS 39205-0220  
TELEPHONE NO. 601-359-3680  
FAX NO. 601-576-2420  
Email: [lholl@ago.state.ms.us](mailto:lholl@ago.state.ms.us)